UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NELSON McINNIS, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C03-4040-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION AND PROCEDURAL HISTORY

The plaintiff Nelson P. McInnis ("McInnis") appeals the Commissioner's ruling that he was "not without fault" in causing an overpayment of disability insurance benefits to

himself and his family members in the amount of $33,609.30, and that the overpayment must be repaid.

Documentation of McInnis's original application for benefits is not part of the record. It appears from an interim review of his status conducted on January 24, 1995, that McInnis was a recipient of Title II disability insurance ("DI") benefits, with a disability onset date of January 31, 1989. (*See* R. 39-40) As of the date of the interim review, McInnis was not performing work at the substantial gainful activity ("SGA") level, and his disability was listed as continuing. (R. 40, 41) In a letter dated January 24, 1995, the Social Security Administration ("SSA") advised McInnis of the determination that his disability was continuing, and also provided him with information about the ongoing review process concerning his claim. The letter indicates McInnis had completed a nine-month trial work period consisting of June 1990 through November 1990, and September 1993 through November 1993, but the SSA had determined the work was not at the SGA activity level. (R. 41)

In the letter, the SSA advised McInnis that he had the following obligations with respect to his ongoing receipt of DI benefits:

> THINGS TO REMEMBER
>
> You must tell us right away about any changes that may affect your benefits. If you don't, you may have to repay any benefits you are not due. Let us know if:
>
> - You went to work since your last report or you return to work in the future (no matter how little you earn); or
>
> - You already reported your work, but your duties or pay have changed. (Remember to keep records of your work and earnings such as pay statements from your employer.); or
>
> - You start paying for work expenses related to your disability (for example, you may need special transportation) or the amount you pay for such expenses

changes or you no longer pay for such expenses. (Remember to keep proof of payment for any work expenses.); or

- Your doctor says your condition has improved (even if you don't work now); or

- You apply for, start getting, or have a change in the amount of worker's compensation or another public benefit.

We will use this information to decide if your health problems still meet our rules, if we must stop your payments because of your work, or if we must change your payment amount.

(R. 42)

The SSA also explained to McInnis that he would continue receiving disability payments as long as his average earnings were not over $500 per month.[1] (R. 44-45)

On January 30, 2000, the SSA apparently sent McInnis a Work Activity Report to complete and return. (*See* R. 50) The SSA stated an inquiry was being initiated because McInnis's earnings record showed "$2475. has been reported for 1994, $4431. for 1995, $4146. for 1996, $3663. for 1997, $4172. for 1998 and $5414. for 1999." (R. 51) When McInnis had not returned the form to the SSA by May 5, 2000, the SSA wrote to McInnis again, enclosing another copy of the form, and notifying McInnis that if the form was not returned within fifteen days, the SSA might contact his employer(s) for information, or might make a decision concerning his continued eligibility for benefits based solely on the information already in the file. (*See* R. 50, 51) It appears that on May 31, 2000, McInnis spoke with someone at the Social Security office in Spencer, Iowa, who completed the form based on information McInnis provided. (*See* R. 52-55) The SSA requested payroll

[1]This amount was increased to $700 per month after June 1999. 20 C.F.R. § 404.1574.

information from one of McInnis's employers, and after reviewing the evidence ultimately determined McInnis's period of disability had ended in June 1998, and therefore his benefits should have ceased in September 1998. (*See* R. 69-71; *see also* R. 56-68)

The SSA subsequently determined McInnis had been overpaid in the amount of $33,609.30. (*See* R. 11, 16, 72-86) The SSA advised McInnis of its determination that he had been overpaid in a letter dated July 4, 2000. (R. 72-80) McInnis requested a waiver of the overpayment. On November 6, 2000, the SSA denied his request. (R. 82-83) In finding McInnis to be "at fault" for the overpayment, the SSA noted McInnis "[d]id not report as notified in his reporting responsibilities," and "[b]etween [McInnis] and spouse (who used to be on DIB) they are fully aware of their reporting responsibilities." (R. 83) The denial of McInnis's waiver request was confirmed by a further letter dated December 28, 2000, in which the SSA demanded refund of the overpayment within thirty days. (R. 91)

McInnis filed a request for reconsideration on December 29, 2000. (R. 94) The request apparently was denied, and on January 3, 2001, McInnis requested a hearing before an Administrative Law Judge ("ALJ"). A hearing was held before ALJ Virgil Vail on June 20, 2001, in Spencer Iowa. (R. 18-35) McInnis was represented by attorney David Scott at the hearing, and McInnis was the only witness who testified. (*See id.*) On August 27, 2001, the ALJ issued his opinion (R. 11-17), finding McInnis was "not without fault" in causing the overpayment of benefits, and denying McInnis's request for waiver of recovery of the overpayment. (R. 16) On March 13, 2003, the Appeals Council denied McInnis's request for review, making the ALJ's decision the final decision of the Commissioner. (R. 3-5)

McInnis filed a timely Complaint in this court on May 14, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order

#1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of McInnis's claim. McInnis filed a brief supporting his claim on September 30, 2003. (Doc. No. 8) The Commissioner filed a responsive brief on November 14, 2003. (Doc. No. 9).

The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of McInnis's claim for benefits.

II. THE ALJ HEARING

At the onset of the hearing, the ALJ stated the issue under consideration was whether McInnis could be found "without fault" for the creation of the overpayment. The ALJ noted the SSA had found McInnis to be at fault "for the reason that he had been sent notices regarding his – well, in the initial application, of course, there's indication that the claimant, if he goes back to work, must notify the Social Security Administration. That, I think everybody would understand that you cannot draw Social Security checks and work at the same time." (R. 21) The ALJ further noted McInnis's wife was on disability, "[s]o she also would be knowledgeable about this." (*Id.*)

The ALJ stated McInnis had the burden of proof, and asked McInnis's attorney if he had a theory of the case. Counsel gave the following explanation regarding McInnis's work history that apparently was accepted by the ALJ as a professional statement. (*See* R. 13-14)

Counsel explained that from 1993 to 1997, McInnis had worked at the Sunshine Center, which employed persons with disabilities. The Sunshine Center assisted its employees in watching the amount of their earnings to be sure they did not jeopardize their ability to receive disability benefits. (R. 22) The work McInnis did at the Sunshine Center

was assembling grease gun parts. (*See* R. 52) McInnis lost the job in 1997, when the Sunshine Center lost the grease gun contract and the business closed. R. 22, 53) Counsel represented that McInnis's work at the Sunshine Center had been "under very, very close supervision," and after he left, he no longer had the help and support of his employer in keeping his earnings below the SGA level.

After he left the Sunshine Center job, McInnis eventually found work at Metz Baking Company. (R. 22) The ALJ noted McInnis's earnings had not exceeded the SGA level until June 1998, while he was working at Metz Baking. Although McInnis acknowledged that he generally was aware there was an earnings limitation, he apparently was not able to monitor his earnings sufficiently to remain below the SGA level. (R. 22-24) McInnis testified he quit the job at Metz Baking in August 1999, because he "got scared" that his earnings were "going over" and he was going to lose his disability benefits. (R. 25)

McInnis stated he had been receiving about $1,200 per month in disability benefits during the time he was working at Metz Baking. His wife was collecting around $375 per month on her own disability account, and his son was receiving $250 or $300 per month on McInnis's account. (R. 26-27) He stated he tried to keep his earnings at Metz under $500 per month, but at some point his gross earnings exceeded that amount. (R. 27) He apparently was earning between $600 and $800 per month at Metz after June 1998. (*See* R. 27)

McInnis explained he worked two days per week at Metz. He stated his "regular job was going to pick up empties and pulling stock on the shelves on the back warehouses to fill up the shelves on those days when the regular truckers wasn't running. . . . [He] went to get the empty trays, loaded them up in [his] truck and brought them back to

Spencer . . . to unload and [he] traveled from [Spencer] to Cherokee up to the lakes and back and up to Emmetsburg and back." (R. 28)

At the time of the hearing, McInnis was working for Heartland Beef, where he had begun working on August 6, 2000. He stated his job was "going really well" and he liked the people he worked with. (R. 29)

McInnis stated the SSA would send him a form every couple of years that he would fill out and return, telling about his work situation. (R. 31) He indicated he does not read well and he did not understand that he was supposed to report his earnings to the SSA regularly, or when they exceeded the SGA level. (R. 29-30) The ALJ noted there was no evidence that McInnis had been "intentionally trying to not report because [he was] bouncing along, you know, not too far from the SGA." (R. 32) The ALJ further noted McInnis was not "in any sense of the word, hiding or withholding information." (*Id.*) However, the ALJ indicated McInnis should have reported his change in income. (*Id.*)

McInnis's attorney noted that in addition to ongoing depression, there was some indication in McInnis's medical records that he had suffered, in the past, from "psychotic features," and counsel argued it was asking a lot for someone who had been working under intense supervision, with the assistance of the Sunshine Center, and then was thrown into a competitive work situation, to be able to understand and recognize the requirement to report his income when it exceeded the SGA level. (*See* R. 32-33)

The ALJ responded that McInnis was aware his income was not supposed to exceed the SGA level. The ALJ also noted, "[T]here's no question about the fact that his, apparently, his wife would know also because of being involved with Social Security Disability." (R. 33)

III. THE ALJ'S OPINION

In his opinion issued August 27, 2001, the ALJ noted McInnis "and auxilliary [sic] beneficiaries" were overpaid Title II benefits in th amount of $33,609.30, for the months of September 1998 through June 2000.[2] (R. 11) The ALJ found McInnis was "not without fault" in causing the overpayment, and the ALJ held the recovery of the overpayment was not waived. (*Id.*) The rationale for the ALJ's determination is discussed below.

The ALJ noted McInnis had worked as a laborer in a sheltered workshop environment from at least August 1993 to October 1997. He was laid off when the business lost its contract to assemble grease guns. The ALJ summarized the arguments of McInnis's attorney that while McInnis worked at the sheltered workshop, he had the assistance and support of its personnel in keeping his income below the then-current SGA levels. When he went to work at Metz Baking, he no longer had that type of support. (R. 13) The ALJ noted McInnis's earnings exceeded the SGA limitation beginning in June 1998, after he started working at Metz Baking, and continued to exceed the SGA levels until August 1999, when McInnis quit working at Metz. The ALJ found the fact that McInnis only looked for part-time work after he left Metz was further indication that he know of the earnings limitations affecting his entitlement to disability benefits. (R. 14)

The ALJ noted that on March 22, 1999, Dr. Francis Conway, McInnis's treating psychiatrist, observed McInnis had made a remarkable recovery in regard to his mood disorder. (*Id.*)

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[2]There is nothing in the record to indicate how this amount was computed. However, in the present case, McInnis is not challenging the amount of the overpayment, but only whether recovery of the overpayment should be waived. (*See* R. 12)

The ALJ noted McInnis had resumed full-time work about one month after he received notice that his period of disability had ceased and he had been overpaid. (*Id.*) Given his return to full-time work, the ALJ found McInnis "was, in fact, capable of performing work activity on a full-time basis at all times since discontinuing his work activity with Metz Baking Company." (R. 15) The ALJ also stated, "More important for purpose of this decision, the undersigned notes the claimant's wife had also received disability insurance benefits during the relevant time period at issue in this decision on her own earnings record and would, also, have been aware of the earnings limitation affecting eligibility for disability insurance benefits." (*Id.*)

The ALJ noted McInnis had acknowledged he was aware there was an earnings limitation applicable to his entitlement to benefits. However, the ALJ found unpersuasive McInnis's testimony that he did not understand from the forms sent to him that he had a duty to report his earnings regularly to the SSA. The ALJ again noted McInnis's "wife was also receiving disability insurance benefits during this time period." (*Id.*)

The ALJ observed that despite McInnis's reading and writing difficulties, he had talked with personnel at the Social Security office in 1995 about his earnings limitation, and he had the ability to seek help from the SSA in understanding the notices and letters sent to him. The ALJ noted further, "Moreover, his wife, herself, would have known, or should have known, the claimant was responsible to report any change in his work activity and earnings to the local Social Security office." (*Id.*) He observed McInnis's wife was not only receiving benefits on her own earnings, she and the couple's child also received benefits on McInnis's earnings, and she therefore "certainly knew, or should have known, the claimant's return to work and earniongs [sic] would impact the amount of benefits due not only himself, but her and their daughter." (R. 15-16)

IV. STANDARD OF REVIEW

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456,

464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796*; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d

1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; *see Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

V. ANALYSIS

As noted previously, the issue before the court is whether the record contains substantial evidence to support the Commissioner's decision that McInnis was not "without fault" in creating and accepting the overpayment of benefits. The SSA regulations provide:

> In determining whether an individual is at fault, the Social Security Administration will consider all pertinent circumstances, including the individual's age and intelligence, and any physical, mental, educational, or linguistic limitations . . . the individual has. What constitutes fault . . . depends upon whether the facts show that the incorrect payment to the individual . . . resulted from:
>
> (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
>
> (b) Failure to furnish information which he knew or should have known to be material; or
>
> (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

20 C.F.R. § 404.507. A finding of "fault" does not require bad faith on a claimant's part; even an "honest mistake may be sufficient to constitute fault." *Center v. Schweiker*, 704 F.2d 678, 680 (2d Cir. 1983) (regarding overpayment of SSI benefits).

If an individual is determined to be "without fault," the individual may apply for waiver of adjustment or recovery of an overpayment of benefits. Waiver of adjustment or recovery may be granted unless it "would either defeat the purpose of title II of the Act, or be against equity and good conscience." 20 C.F.R. § 404.506(a). Thus, the first

determination is whether the individual was "without fault," and if so, then whether a waiver of adjustment or recovery would defeat the purposes of Title II, or would be against equity and good conscience.

In the present case, McInnis argues the ALJ failed to give proper consideration to his mental and educational limitations, failed to develop the record fully and fairly, improperly imputed the knowledge of McInnis's wife to McInnis, and erred in failing to make a credibility determination. (*See* Doc. No. 8) The Commissioner argues McInnis is trying to relitigate his prior disability claim, the ALJ properly considered all of the relevant factors, and the record contains substantial evidence to support the ALJ's decision. (*See* Doc. No. 9)

The court finds persuasive McInnis's argument that the ALJ failed to develop the record fully and fairly for purposes of considering McInnis's intelligence, and his mental and educational limitations. At the very least, the record should contain evidence regarding his ability to read, understand, and carry out the SSA's directions at the time he received them. The court disagrees with the Commissioner that McInnis is trying to relitigate his disability claim. McInnis was found to be disabled, and was paid benefits on that basis. The question here is whether his disability prevented him from understanding and complying with his reporting requirements. The Ninth Circuit Court of Appeals has held, "[T]he decision which must be reached in a fault determination is highly subjective, highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation." *Harrison v. Heckler*, 746 F.2d 480, 482 (9th Cir. 1984) (citing *Elliott v. Weinberger*, 564 F.2d 1219, 1233 (9th Cir. 1977)). The *Harrison* court further held, "The fault determination requires a reasonable person to be viewed in the claimant's own circumstances and with whatever mental and physical limitations the claimant might have." *Id.* (citing *Elliott*, 564 F.2d at 1233 n.19).

Here, the ALJ chose not to believe McInnis's testimony that he did not understand he was supposed to report changes in his income, yet the ALJ offered no contrary evidence. As a result, the record lacks substantial evidence to support the ALJ's conclusion that McInnis was at fault. "As a matter of logic, the utter absence of evidence in the record cannot be deemed 'substantial.'" *Coulston v. Apfel*, 224 F.3d 897, 901 (8th Cir. 2000) (*per curiam*) (Bye, J., concurring).

An ALJ's duty to develop the record fully and fairly is not limited to disability cases, but extends to every type of administrative hearing. It goes without saying that an adequate record must be developed to support an ALJ's decision. This fact has been recognized by every federal court in innumerable appeals from the denial of disability and SSI benefits, but also has been recognized in other contexts. *See, e.g.*, *Everetts v. Apfel*, 214 F.3d 990, 993 (8th Cir. 2000) (noting ALJ's responsibility to develop the record in case involving appeal from denial of widow's insurance benefits); *Jacinto v. I.N.S.*, 208 F.3d 725, 733 (9th Cir. 2000) (holding duty of immigration judge is analogous to ALJ's duty in Social Security disability cases; noting "[b]oth administrative settings have the common feature of determining the applicant's eligibility for certain benefits"; both types of hearings "are likely to be unfamiliar settings for the applicant"; and "such procedures 'should be understandable to the layman claimant . . . and not strict in tone and operation'") (quoting *Richardson v. Perales*, 402 U.S. 389, 400, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)); *Duenas v. Shalala*, 34 F.3d 719, 722 (9th Cir. 1994) (noting ALJ has duty to develop the record in case involving applicant's eligibility for retirement benefits); *cf. Cannon v. Apfel*, 213 F.3d 970, 977 (7th Cir. 2000) (claimant seeking reimbursement of benefits misused by representative payee; court noted ALJ's duty to develop the record is satisfied by allowing non-attorney representatives to submit evidence and argument on claimant's behalf).

Further, in this case the determination of fault depends to a significant degree on McInnis's credibility. McInnis's testimony is the only evidence in the record regarding his ability to understand and comply with his reporting requirements. If his testimony is credible, then he would be entitled to a waiver. The court therefore finds the ALJ should have made a credibility determination. As the United States Supreme Court has observed, "Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility," allowing the Commissioner to "distinguish a genuine hard luck story from a fabricated tall tale. *Califano v. Yamasaki*, 442 U.S. 682, 696-97, 99 S. Ct. 2545, 2555, 61 L. Ed. 2d 176 (1979) (citation omitted).

McInnis testified he had some understanding that his income was not supposed to exceed certain levels, and he quit working at Metz Baking in August 1999, because he "got scared" that his earnings might be exceeding the requisite amount and he could lose his disability benefits. (R. 25, 27) The court finds it notable that this occurred more than a year after McInnis's earnings apparently began exceeding the SGA level. McInnis also testified he never knew he had to report his earnings to the SSA. He filled out periodic review forms that were sent to him by the SSA, but he stated he did not understand that he was supposed to make additional reports if his earnings changed. (*See* R. 30-31) Beyond McInnis's own testimony, there is virtually no evidence in the record from which a decision could be made regarding what McInnis knew, or reasonably could be expected to have known, regarding his reporting requirements or his receipt of overpayments. Although the record contains substantial statements of opinion by McInnis's attorney and by the ALJ regarding McInnis's fault in the matter, the record lacks substantial evidence of *anything* other than the fact of the overpayment, which is not contested here.

The ALJ repeatedly refers to the fact that McInnis's wife also received benefits, and therefore she, at least, should have known McInnis was being overpaid. Again, beyond

the ALJ's own statements of opinion, there is absolutely no evidence in the record to support the ALJ's finding that McInnis's wife knew or should have known McInnis was being overpaid – a finding to which the ALJ attributed significant weight. The Commissioner refers to the ALJ's statements regarding McInnis's wife as merely "a common sense addendum to the decision for the benefit of the claimant." (Doc. No. 9, p. 10) However, the ALJ repeatedly emphasized his reliance on the fact that McInnis's wife "should have known" McInnis's income had exceeded the maximum for continued receipt of disability benefits. (*See, e.g.*, R. 15, "*More important for purposes of this decision*, the undersigned notes the claimant's wife had also received disability insurance benefits during the relevant time period at issue in this decision on her own earnings record and would, also, have been aware of the earnings limitation affecting eligibility for disability insurance benefits." (Emphasis added.)) The ALJ's reliance on what McInnis's wife knew or should have known "is irrelevant. The Administration's regulations state that a claimant is at fault if *he* knew or should have known the overpayment was incorrect." *Coulston*, 224 F.3d at 899 (emphasis added; citing 20 C.F.R. § 404.507).

The transcript of the hearing suggests the ALJ had already formed an opinion about the case prior to the commencement of the hearing. He failed to develop the record regarding McInnis's ability to understand and comply with his reporting requirements, and he failed to offer evidence from any source to support his opinion that McInnis was at fault. He discounted McInnis's testimony without making a credibility finding, and he placed improper emphasis on what McInnis's wife knew or should have known, with no evidence whatsoever to support his conclusions in that regard.

For these reasons, the court finds the record does not contain substantial evidence to support the Commissioner's decision, and this case should be reversed and remanded for development of the record and consideration of further evidence.

VI. CONCLUSION

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[3] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Commissioner's decision be reversed, and this case be remanded for further proceedings consistent with this opinion.[4]

IT IS SO ORDERED.

DATED this 13th day of May, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[3] Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

[4] NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.